The application of distributive justice to energy taxation utilising sovereign wealth funds

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Title:

The Application of Distributive Justice to Energy Taxation utilizing Sovereign Wealth Funds

Abstract:

The energy sector is characterized by inequality and this is part due to the lack of distributive justice applied to energy resource tax revenue. This paper advances one solution to this problem which is for such countries to establish a Sovereign Wealth Fund. There is limited literature on ensuring that distributive justice is a key policy goal of energy taxation and this research aims to contribute to that literature as well as the emerging literature on Sovereign Wealth Funds. Too often as identified in the research, energy taxation policy is developed in isolation and a more holistic perspective is needed which incorporates the entire tax system. A focus on distributive justice as an over-arching energy taxation policy goal is particularly important as a retention of the current status quo will continue to see countries lose the majority of the benefits of their own energy resources to foreign markets and consumers. A Sovereign Wealth Fund, at its core a legal construct with a financial purpose can not only contribute to increased distributive justice but can also ensure increased accountability, transparency and governance in their energy sector.

Key words:
Distributive Justice; Energy Taxation: Sovereign Wealth Funds; Norway; Democratic Republic of Congo

1. Introduction

The last two years of 2016 and 2017 are witness to some key developments in the development of tax law and policy around the world. One of these has been the reform of the US tax code led by the Trump administration and advanced through the House and the Senate via the Republican party. The majority of commentators and also the Democrat party have made it clear that these changes will result in an unfair distribution towards the wealthy and corporate elite. That this situation has arisen, and in such an open and transparent way, demonstrates a problem of our times. It is therefore of vital importance that there are public interest groups and/or individuals who bring voices to policy debates that challenge the policy-makers.

Controversy surrounds the taxation of multinational companies (MNCs) from all business sectors. This paper focuses on the energy sector. This is a sector that has long been recognized as one where inequality is rife internally and that it is responsible for much societal inequality (with a recent Special Outlook within *Nature* on these issues).[1] There has been some progress on reforming taxation in the energy sector over the last decade with the continued success of the Extractive Industries Transparency Initiative [2] that places disclosure obligations on companies and governments. Nevertheless, there remain significant problems and in particular the issue of inequality because of a lack of tax revenue received and redistributed from the extractive industries by host governments.

This paper focuses on this issue of taxation and inequality in relation to the management of natural resources. The central question of this paper is to determine whether through taxation a fairer distribution of the benefits of a country's natural resources can be achieved. In this context, The aim of this conceptual and comparative paper is to advance the hypotheses that: (1) policy on energy taxation is too often formulated in isolation and not integrated within the overall energy system; and (2) a creation of a Sovereign Wealth Fund is one method of a more integrated tax policy and has a key feature of ensuring distributive justice in the energy sector.

At its core, this is a conceptual and desk-based research paper that searches specifically for how there can be increased distributive justice in the area of energy taxation. The comparative element of the analysis examines the policies of Norway and the Democratic Republic of Congo (DRC). Finally, the article contributes to the growing literature in relation to distributive justice in taxation and energy literature, while also advancing the emerging literature on Sovereign Wealth Funds (SWFs); with the latter being identified as one potential solution of how to increase distributive justice in energy taxation policy.

This paper begins in section two with a focus on distributive justice and highlights some of the recent literature in economic, energy law and policy, and taxation. Section three explores how the problems of energy taxation, and how it is a policy

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[1] Nature, 551, (30 November 2017) – Available at: { HYPERLINK "https://www.nature.com/nature/journal/v551/n7682/index.html" \l "out" } (last accessed February 2018).

[2] Extractive Industries Transparency Initiative. Available at: { HYPERLINK "https://eiti.org/" } (last accessed February 2018).

area that is formulated in isolation, i.e. there is no holistic and integrated thinking. Section four then discusses one solution that emphasizes a more holistic approach to energy taxation and this is the establishment of a Sovereign Wealth Fund (SWF). A SWF can ensure that distributive justice is a core goal of energy taxation policy. This section presents a comparison of Norway with a SWF and a country without one, the DRC. Finally, the paper in the conclusion highlights how increasing distributive justice through establishing a SWF aligns with energy law principles and provides several other reflections on the policy implications of this paper.

2. Distributive Justice as a Policy Goal and in the Literature

2.1 Introduction

Distributive justice is fast becoming a popular area of focus in law and public policy literature and also in other disciplines. One can argue it has always been central to the political debate in that it is a foundation of a democracy or more specifically perhaps a ‘social democracy’. This paper does not intend to engage in those debates which are worthy of extended discussions in themselves, rather, the focus here is why distributive justice remains lacking in the area of taxation and more specifically in relation to energy taxation. This section covers in brief those areas in the literature that research distributive justice such as economics, energy law and policy, and tax law and policy.

2.2 Distributive Justice & Economics

Economists for years have been working on the issue of distribution (i.e. in essence they have advocated for distributive justice). Several of these scholars have now received Nobel Prizes for their work in this area and closely related areas, mainly: Angus Deaton, Joseph Stiglitz, Paul Krugman, and Amartya Sen. One economist who may join this group in the future is Thomas Piketty[3] whose work on taxation and wealth distribution has received significant attention recently. Unfortunately, as demonstrated by the earlier example of what is happening in the US, the work of these academics has not translated into policy outcomes there, but it still influence policy in other countries.

In assessing the issue of distributive justice in the energy sector there is unfortunately a lack of literature in the area. The majority of energy economists focus on costs of production, and impacts to price etc. but there is limited literature that has reflected on distributive justice. Further, many energy economists echo the view of one economist who in is his mining economics text stated that the major focus of economics in relation to mining (which includes all the extractives industries) should be profitability.[4] Indeed the same author went even further in his textbook and suggested that a social objective (and even environmental) for a mining company is “self-deluding”.[5] Hence it can be stated that an issue such as distributive justice is clearly not at the forefront of the private sector actors in the mining sector.

[3] Piketty, T. 2014. *Capital in the Twenty-First Century* (translated by Goldhammer, A.). Belknap Press of Harvard University Press: MA, US.
[4] P. 405. Crowson, P. 2008. *Mining Unearthed*. Aspearmont UK: London, UK.
[5] P. 405. Crowson. 2008.

2.3 Distributive Justice & Energy Law & Policy

In energy policy research literature, distributive justice is already a key theme.[6] It has been a focus of researchers increasingly since 2013 and forms part of three central tenets of the 'energy justice' concept, alongside procedural and recognition justice.[7] However, energy researchers have identified distributive justice as the key element as it allows for more engagement with policy-makers.[8] The energy sector like many areas of commerce has faced calls for reform, and a renewed focus on transparency and ethics alongside calls for a fairer and more equitable energy system.[9] Again similar to other sectors, the energy sector is dominated by multi-nationals and international finance, and the issue of taxation plays a large role in the operations of such firms. In some cases, the issue of taxation is a lead contributor as to the decision of whether to build, buy or sell an energy asset.

More specifically, energy law scholarship to-date has hesitated in making judgment in relation to advocating for distributive justice in the energy sector. Energy law scholars have been more interested in the construction of tax regimes rather than thinking of designing these tax regimes with an element of distributive justice. However, more recently over the last circa five years, the issue of distributive justice is increasing in the literature in energy law. Scholars have included it as they have developed: a guiding set of principles for energy law[10]; in ongoing development of the discipline[11]; and in its interdisciplinary boundaries.[12] All these factors are leading to distributive justice having a more prominent role in the discipline and therefore impacting more on future public policy outcomes.

2.4 Distributive Justice & Taxation

These developments in energy economics, law and policy scholarship mirror the growing importance of distributive justice in the tax discipline. For many taxation scholars, distributive justice has always remained a core value of their research (see the work of Reuven Avi-Yonah[13]). Indeed, tax law and policy has certainly become a popular societal issue over the last few years, and it has been described as a noisy

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[6] Heffron, R. J. & McCauley, D. 2017. *The concept of energy justice across the disciplines*. Energy Policy, 105, 658-667.

[7] McCauley, D., Heffron, R. J. Stephan, H. and Jenkins, K. 2013. *Advancing Energy Justice: The triumvirate of tenets*. *International Energy Law Review,* 32 (3), 107-110.

[8] Sovacool, B, Heffron, R. J., McCauley, D & Goldthau, A. 2016. *Energy decisions reframed as justice and ethical concerns*. *Nature Energy*, doi: 10.1038/nenergy.2016.24

[9] Heffron & McCauley. 2017.

[10] Heffron, R. J., Ronne, A., Bradbrook, A., Tomain, J. P. and Talus, K. 2018. *A Treatise for Energy Law*. Journal of World Energy Law & Business, 11 (1), 34-48.

[11] Heffron, R. J. and Talus. K. 2016. *The development of energy law in the 21st century: a paradigm shift?* Journal of World Energy Law and Business, 9 (3), 189-202.

[12] Heffron, R. J. and Talus. K. 2016. *The Evolution of Energy Law and Energy Jurisprudence: Insights for Energy Analysts and Researchers*. *Energy Research and Social Science*, 19, 1-10.

[13] Reuven Avi-Yonah, 2018. University Webpage Profile: { HYPERLINK "https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=aviyonah" } (last accessed January 2018).

subject.[14] And this has translated into legal academia, where last year 11 out of the top-12 most downloaded academics were tax law specialists (on the Social Science Research Network).[15] The first was the aforementioned Reuven Avi-Yonah who has an obvious distributive justice theme running throughout his research and this demonstrates in part how the issue of distributive justice is rising in prominence.

It should be noted however, that the goal of distribution has long been a tax policy goal but perhaps in many ways has received limited attention until more recently (as stated above).[16] Indeed, recent scholarship has concluded that distributive justice should be recognized as the cornerstone of tax law, i.e. as the "first or sovereign virtue of a society's tax system".[17] Unfortunately however, there are many examples of recent literature that do not address or focus on distributive justice despite topics of research that should, for example, such as tax fraud.[18] It nevertheless has been advanced that Adam Smith has argued that distributive justice was a key tax policy goal but legal certainty was needed in order for distributive justice not to be just an illusory goal and that this still applies to this day[19]; and this is certainly in issue for many developing countries when establishing their energy taxation policy.

2.5 Summary

It should be noted that in thinking about taxation and overall role in the economy, it is surprising that there is not more of a reflection on distributive justice given its relationship with Smith's four principles of taxation. It is advanced in this paper that there is a significant lack of distributive justice already in the majority of countries and this happens particularly in relation to the issue of energy taxation. This paper aims to examine how an increased role for distributive justice can improve policy-making in relation to energy taxation.

Further it should be stated that it is not that the recent rise of distributive justice was as a result of a policy goal, rather it has resulted from the introduction of law in other areas and also the opposition to the actions and behaviour of multinational companies. In many ways a multitude of different developments have resulted in an increased change and rise to prominence of distributive justice. It is almost as if law and public policy in relation to the promotion of distributive justice have been superseded by an

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[14] Deloitte. 2013. *Responsible Tax: Sustainable tax strategy*. Available at: { HYPERLINK "https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/tax/uk-tax-responsible-tax-v2.pdf" } (last accessed January 2018).

[15] See the data from the following two academic blog posts: Available at: (1) { HYPERLINK "http://taxprof.typepad.com/taxprof_blog/2018/01/ssrn-tax-professor-rankings-1.html" } and (2) { HYPERLINK "http://taxprof.typepad.com/taxprof_blog/2018/01/11-tax-profs-blow-up-the-ssrn-download-rankings.html" } (last accessed January 2018).

[16] Gribnau, H. and Vording, H. 2017. *The Birth of Tax Law as a Legal Discipline*. Harris, P. and de Cogan, D. (Eds.). 2017. *Studies in the History of Tax Law*, Volume 8. Oxford, UK: Hart Publishing.

[17] P.167. Duff, D. 2017. *Tax Policy and the Virtuous Sovereign: Dworkinian Equality and Redistributive Taxation*, (p.167-89). In Bhandari, M. (ed). 2017. *Philosophical Foundations of Tax Law*. Oxford University Press: Oxford, UK.

[18] De la Feria, R. 2018. *Tax Fraud and the Rule of Law*. Oxford University Centre for Business Taxation, Working Paper Series 18/02 (January 2018).

[19] Gribnau and Vording. 2017

invisible hand that has pushed it to the fore. This article explores what that this ‘invisible hand’ is, and in concludes after this analysis of literature in this section, that it is the increased understanding of the ‘interconnectedness’ of different issues in society. In essence, it could be stated that society is becoming more learned in relation to interdisciplinary issues[20]– and this is why this section has covered distributive justice from an economic, law and policy and taxation perspective. And it should be added that education in taxation is recognizing tax as a interdisciplinary discipline; see the recent establishment of the University of Oxford Taxation Masters a joint programme between the Faculty of Law and Oxford University Centre for Business Taxation based at Saïd Business School.

Finally, it is clear that where distributive justice is of a noted concern is relation to taxation is in developing countries.[21] This has been recognized in the literature, and perhaps follows a trend of developed countries using the taxation system to increase distributive justice, and that it should be one of the three main goals of taxation.[22] This paper in exploring energy taxation and distributive justice aims to add to the literature and demonstrate how societies whether considered developed or developing nations can benefit from the application of distributive justice in energy taxation policy.

3. Energy Taxation Policy in Isolation

3.1 Introduction

Energy taxation policy has too often been formulated in isolation. It should be developed in a more holistic way across the energy industry or system. While other areas of commerce have benefited from a near invisible hand – as mentioned in Section two earlier – that is restoring distributive justice, the energy sector has not. For example, in a recent practitioner and academic text on energy taxation, the issue of distributive justice receives limited attention.[23] While the text does acknowledge it does not cover all issues, it states that in relation to taxation “*The central task for policymakers is to design fiscal regimes for the extractive industries that raise sufficient revenue, provide adequate incentives to invest and are implementable at reasonable cost to both government and taxpayers*”.[24] In essence, the issue of distributive justice has to be inferred from the quote above and that is similar to the majority of energy taxation literature. The use of limited and vague words such as ‘sufficient’ and ‘adequate’ already suggests that the balance of power lies with the multinational companies who develop the majority of resources worldwide.

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[20] Nature, 2015. Special Issue on *Interdisciplinarity*. Available at: { HYPERLINK "http://www.nature.com/news/interdisciplinarity-1.18295" } (last accessed 30 January 2017)

[21] Bird, R. M. and Zolt, E. M. 2005. *Redistribution Via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*. 52 UCLA L. Rev. 1627

[22] Avi-Yonah, R. S. 2006. *The Three Goals of Taxation*. Tax L. Rev. 60, no. 1, 1-28.

[23] Daniel, P., Keen, M., Swistak, A. and Thuronyi, V. (Eds.). 2017. *International Taxation and the Extractive Industries*. Oxford, UK: Routledge.

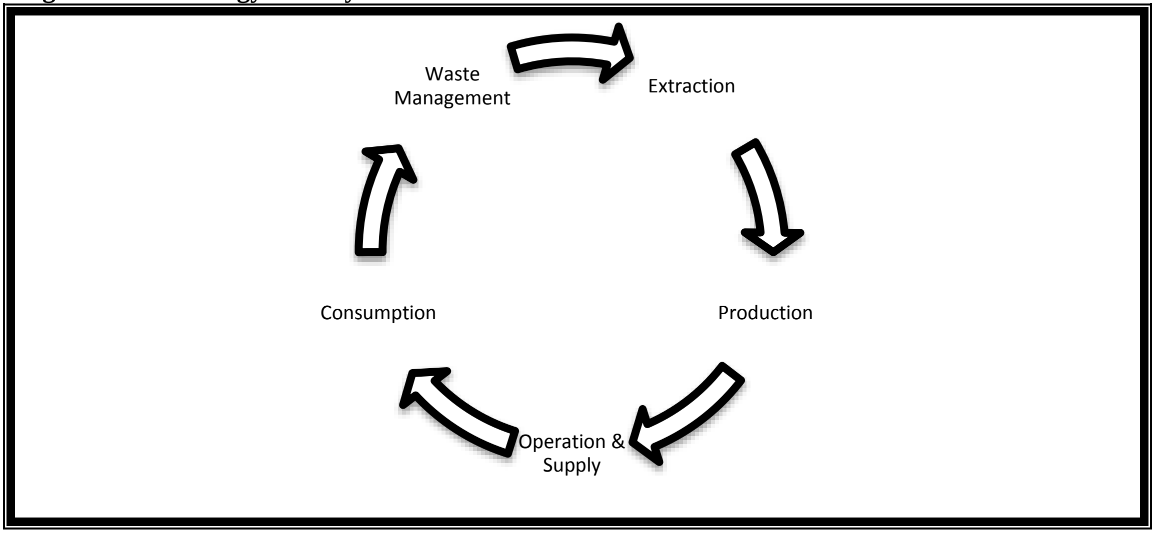
[24] P. 1. Daniel *et al.* 2017.

The energy sector is responsible for significant inequality in society (as highlighted earlier in section one) and distributive justice in energy taxation can play a key role in rectifying that. Fiscal regimes for the energy sector need to be developed that cover and fund all energy activities in a nation, and potentially provide finance for other obligations of a state to its taxpayer (i.e. such as health and/or social welfare systems). The benefits should not accrue in an unfair way to multinationals and their home countries. This section demonstrates why energy taxation policy happens in isolation and why distributive justice has not featured prominently to energy taxation policy formulation.

3.2 The Energy System (the Life-Cycle)

Energy taxation policy and why it is formulated in isolation can be best explained using the example of the Energy Life-Cycle diagram shown in Figure 1 below.

Figure 1: The Energy Life-Cycle[25]



The energy life-cycle diagram shows the five main stages of energy activity in the energy sector or system. This is a well-accepted diagram across all energy disciplines in the energy sector (and is also known as 'cradle-to-grave'). What happens in terms of formulating tax policy in the energy sector is that there is no energy system thinking applied to tax policy. There is a piecemeal approach to taxation, where different energy activities and energy sources are subject to different taxation. This undoubtedly distorts the energy sector. It affects decision-making around the choice of energy sources developed and where the revenues flow from different energy activities.

Too often for resource rich nations, there is limited redistribution from the wealth created by the natural resources. The taxation issue for example is focused entirely on stage one of the energy life-cycle above, i.e. extraction. This narrow approach to taxation results in few benefits for developing the rest of the energy sector, and also

[25] Heffron and Talus. 2016. *The Evolution of Energy Law and Energy Jurisprudence: Insights for Energy Analysts and Researchers*. Please Note: The diagram was adapted by those authors from the: US EPA, Climate Change and the Life Cycle of Stuff, available at { HYPERLINK "http://epa.gov/climatechange/climate-change-waste/life-cycle-diagram.html" } (last accessed January 2018).

means that it is the multi-national companies engaged in extraction who benefit the most by owning, utilising and selling these resources for energy activities later in the process. Indeed, the importance of effective taxation of multinational companies has been noted in the literature specifically in this context.[26]

3.3 Core Energy Tax Policies

It is recognized that there are valid reasons for countries to have different taxation regimes, however, at the same time it is evident that there is a clear level of convergence in terms of taxation policies across countries.[27] In a seminal text in the area of energy taxation, the core areas of energy taxation are identified, and these include in summary: environment (i.e. generally, carbon, and greenhouse-gases) electricity production, extraction, nuclear, hydroelectric, and renewable energy.[28] In assessing what is included, at first one could observe that the wide coverage of areas of different energy sources and activities is a positive. Nevertheless, there is little holistic thinking as to how they relate to each other and how if coordinated they could contribute to better policy outcomes.

The European Union (EU) has however recognized this issue (in 2010) and stated that taxation can play a key role in delivering the energy and climate policies of the EU.[29] This has not translated to action by other countries and nor perhaps has it delivered too much success in Europe; though the majority of EU member states are not resource-rich. Overall, in the aforementioned edited volume on energy taxation, there are multiple authors who acknowledge that a well-designed energy taxation system is fundamental to delivering on all energy and climate policy goals.[30]

The issue of energy taxation is complex. There are competing interests in terms of economic growth and development over for example the environment and distributive justice in taxation policy. Many developing countries lack the expertise and the institutional structures to deliver effective energy tax policies that could incorporate distributive justice. However, there are solutions, and indeed a leading economist calls for more action and solutions, and highlights the lead role law can play in this area of taxation and energy, environment and climate issues.[31] In the following section, the development of Sovereign Wealth Funds is analysed as these have a long-term, and distributive strategy for utilising revenue from energy and natural resources.

4. Sovereign Wealth Funds, Energy Taxation Policy and Distributive Justice

4.1: Introduction

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[26] Daniel *et al.* 2017.
[27] Sandford, C. 2000. *Why Tax Systems Differ? A Comparative Study of the Political Economy of Taxation*. Fiscal Publications: Bath, UK.
[28] Pistone, P. and Villar Ezcurra, M. (Eds.). 2016. *Energy Taxation, Environmental Protection and State Aids: Tracing the Path from Divergence to Convergence*. Amsterdam, The Netherlands: IBFD.
[29] Traversa, E. and Wolff, S. 2016. *Energy Tax Policy in an EU Context: Non-Discrimination, Free Movement and Tax Harmonisation*. In Pistone and Villar Ezcurra, M. (Eds.). 2016.
[30] Pitrone, F. 2016. *Design of Energy Taxes in the European Union: Looking for a Higher Level of Environmental Protection*. In Pistone and Villar Ezcurra, M. (Eds.). 2016.
[31] Tirole, J. 2017. *Economics for the Common Good*. NJ, US: Princeton University Press.

An example of a more holistic and integrative approach to energy taxation policy is the creation of a Sovereign Wealth Fund (SWF). This integrative approach results in increased distributive justice as the benefits from a SWF that are stated to be fiscal stability and the spreading of the benefits from finite resources over successive generations.[32] Although the use of the term 'distributive justice' or 'distribution' are not used in the majority of literature on SWFs it is clear that they are used as a key method of achieving an energy taxation regime that is more 'just' in distribution of the revenue raised from the energy sector than if none exists. The contribution of this paper is on the distributive justice nature of a SWF whereas previous literature has focused more broadly on the ability of a SWF to improve governance and institutional quality.[33]

This section explores SWFs and presents them as a solution for achieving more distributive justice in energy taxation policy. It first highlights what they are before exploring a model performing SWF and what may happen if there is no SWF (with Congo given as an example). While literature on SWFs is increasing[34] there remains a limited amount and this will be the first paper to explore the distributive justice (and equality) and SWFs.

4.2 What is a Sovereign Wealth Fund?

There are many definitions of what a Sovereign Wealth Fund is and these emanate from different international institutions, such as the IMF, etc. However, there is a more clear definition expressed in recent literature on the subject and this is that SWFs are "… *extra budgetary mechanisms holding a (generally natural resource based) fiscal or foreign exchange reserve surplus*."[35]

A SWF will use revenue raised via taxes on energy resources in that nation to invest for the long-term in investments external to that nation (in some cases the SWF may invest domestically). The aim is always to share the benefits of energy sources and to ensure that future generations benefit too. There is limited information on SWFs and not all are very transparent but the value of SWFs internationally is growing and their creation is too, and even more countries are researching their establishment and/or planning to introduce one. Overall, SWFs are currently valued at US$7.4 trillion (2016) a figure that has remained constant since 2014.[36] There are 79 SWFs listed by the Sovereign Wealth Fund Institute's rankings page with 53 of these being natural resource (i.e. includes all the extractive industries) funded; it should be noted that some countries have more than one, for example there are 8 in the US.[37]

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[32] Rietveld, M. and Toledano, P. (Eds.). 2017. *The New Frontiers of Sovereign Investment*. New York, US: Columbia University Press.
[33] Tsani, S. 2013. *Natural resources, governance and institutional quality: The role of resource funds. Resources Policy*. Vol. 38 (2) 181-195.
[34] Alhashel, B. 2015. *Sovereign Wealth Funds: A Literature Review*. Journal of Business and Economics. Vol. 78, 1-13.
[35] P. 5, Rietveld and Toledano. 2017.
[36] Carpantier, J. F. and Vermeulen, W. N. 2018. *Emergence of Soverign Wealth Funds*. Journal of Commodity Markets. (In Press - { HYPERLINK "https://doi.org/10.1016/j.jcomm.2018.01.002" \t "doilink" }).
[37] Sovereign Wealth Fund Institute. 2018. Available at: { HYPERLINK "https://www.swfinstitute.org/sovereign-wealth-fund-rankings/" } (last accessed January 2018).

4.3 A Model Sovereign Wealth Fund in Practice

As stated earlier, there is limited literature on SWFs but it is increasing. From a key article which provides a literature review on SWFs it is held that there are key themes in the literature such as: regulation of SWFs, positives and negatives for firms and target countries; investment strategies; and a new area of shareholder activisim.[38] This is interesting in that the literature does not focus on the distributive effect of an SWF, despite this being one of its core purposes as stated in the majority of definitions by researchers and also in relation to information provided by the funds themselves. For example, a review of a selection of SWFs such as the Texas Permanent University Fund (US),[39] The Norwegian Government Pension Fund Global,[40] and the Alberta Heritage Fund (Canada)[41] reveals quite clearly that there is a distributive justice core to their key objectives. As such a core contribution of this paper is in identifying this gap of how SWFs have a distributive justice goal as a result of taxation policy for the energy sector.

A model of the best practice of an SWF in operation is the Norwegian SWF (referred to as the *Government Pension Fund Global*) which is ranked first in the international SWFs rankings.[42] The Norwegian SWF has raised its capital by the taxation from its energy resources which are oil and gas. There were three significant legal developments that occurred: The first was in 1963 when Norway introduced new law whereby the State owned all natural resources found in the Norwegian Continental Shelf (NCS); the second was the creation of a state-owned company, Statoil which was established via legislation in 1972; and the third was the introduction of the fiscal regime whereby the marginal rate of tax on oil and gas from the NCS was 78% (consisting of ordinary tax at 27% and a special tax rate of 27%).[43] Initially while Norway did not find anything, since then there have been many oil and gas discoveries. Norway is now the third largest gas exporter and eighth largest oil exporter in the world.

This is not going to be an extensive review of the operation of the Norwegian SWF but aims to focus and identify the distributive justice elements of their SWF. The mission statement of the Norwegian SWF highlights its distributive justice core: "*The Government Pension Fund Global is saving for future generations in Norway. One day the oil will run out, but the return on the fund will continue to benefit the*

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[38] Alhashel. 2015.

[39] Texas Permanent University Fund (US). 2018. { HYPERLINK "https://www.utsystem.edu/puf" } (last accessed January 2018).

[40] The Norwegian Government Pension Fund Global. 2018. { HYPERLINK "https://www.nbim.no/en/the-fund/" } (last accessed January 2018).

[41] Alberta Heritage Fund (Canada). 2018. { HYPERLINK "http://finance.alberta.ca/business/ahstf/index.html" } (last accessed January 2018).

[42] Sovereign Wealth Fund Institute. 2018. Available at: { HYPERLINK "https://www.swfinstitute.org/sovereign-wealth-fund-rankings/" } (last accessed January 2018).

[43] All the data in this sub-section on *A Model SWF in Practice* is from the website of The Norwegian Government Pension Fund Global. 2018. { HYPERLINK "https://www.nbim.no/en/the-fund/" } (last accessed January 2018).

Norwegian population."[44] It highlights the aim to provide intergenerational justice, promote a long-term objective and also to practice sustainability. There is also intra-generational justice in the form of an annual contribution from the SWF to the Norwegian national budget. This amount is 3% of the value of the fund or in essence is to be the annual return on the fund, and this is used to support a range of public benefits such as social welfare, health and education. In the longer-term it will also be used to provide resources for environmental problems resulting from the energy sector such as the decommissioning and waste management issues of the energy sector – though this is subject to more research and approval over the next few years. It should also be noted that the Norwegian SWF highlights its transparency and accountability in its decision-making, and ensures responsibility in its investment practices.[45]

4.4 Results if no Sovereign Wealth Fund is Present: The Case of Congo

The ambition of the Norwegian SWF is clear. It is motivated by distributive justice as it ensures all the Norwegian population benefit from its energy resources. Many resource rich countries however do not have such motivations and it is unclear who benefits but it is certain that no element of distributive justice is incorporated into their energy taxation policy. There are many examples that demonstrate this problem and the country of the Democratic Republic of Congo (the DRC) will be used as an example here. The DRC is a country rich in energy resources and until very recently has not used energy taxation policy for distributive justice purposes. The reason to choose the DRC as an example is that it is Africa's biggest producer of copper and cobalt (used in smartphones and electric cars).

The DRC demonstrates clear problems of not having a SWF and in many ways, it identifies that SWFs provide legitimacy to a national government's aim of ensuring distributive justice is applied to tax revenue from energy and natural resources. The DRC has a national mining company, Gécamines, which oversees its mining sector. It receives and is responsible for creating revenue from the DRCs energy and natural resources. It is clear over the years, as demand in particular for cobalt has increased, that there has been a realisation that the people of Congo have not benefitted as much as the multi-national companies. As a result the Chairman of Gécamines stated recently that all contracts with foreign companies in the mining sector will be reviewed within the next year due to the imbalance of these contracts.[46] This is a positive development for the population of the DRC but this decision would have more legitimacy if the DRC had a SWF.

Currently, the latter the decision is questioned by multi-national companies operating in the DRC as there are reports of unaccounted revenue (up to $750) received by Gécamines.[47] Despite this, it is still acknowledged that MNCs have found ways to

[44] The Norwegian Government Pension Fund Global. 2018.
[45] The Norwegian Government Pension Fund Global. 2018.
[46] Financial Times. 2018. *DRC mining co to renegotiate all contracts within next year* (6 February 2018). Available at: { HYPERLINK "https://www.ft.com/content/d6cb308a-0b4e-11e8-8eb7-42f857ea9f09" } (last accessed February 2018).
[47] The Carter Center. 2017. *A State Affair: Privatizing Congo's Copper Sector*. (Atlanta, GA, US). Available at: { HYPERLINK

reduce their tax liabilities and it is reported in the Paradise Papers leak in 2017, that Glencore, an international mining company had received $440 million in discounts in 2008[48]; and Glencore, an Anglo-Swiss company is subject to a criminal complaint in Switzerland due to its operations in the DRC[49] and the US announced sanctions against one individual involved in Glencore's recently in December 2017.[50] Another major company in operation in the DRC is Ivanhoe, and in light of the contract reviews, its founder, stated that "*I don't mind paying . . . as long as that royalty goes to develop, help and empower local people," he told the Investing in African Mining Indaba in Cape Town. "I want the accounting of that money to be transparent and absolutely help people around the mines*".[51] It is clear that there are even those from the energy companies who are interested in seeing more distributive justice applied in relation to the energy taxation. As highlighted above while there may be doubt about what will happen the energy tax revenue and it is clear that the establishment of a SWF would provide that legitimacy, accountability and transparency on how that energy tax revenue is spent; and equally the actions of multinationals in reducing their tax liabilities can be reduced with improved governance mechanisms that the establishment of an SWF will bring. In this way this research builds on previous research which highlights how resource funds can improve governance and institutional quality.[52]

4.6. Summary

There are obvious benefits to the DRC in creating a SWF and the question needs to be asked why it has this not been discussed or happened yet or why has the international community nor proposed it.[53] The IMF has advocated for the SWFs (or resource

"https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/congo-report-carter-center-nov-2017.pdf" } (last accessed February 2018).

[48] ICIJ (Fitzgibbon, W.). 2017. *Paradise Papers Research Raises Questions Over Glencore's $440m Congo Discount.* (14 December). Available at: { HYPERLINK "https://www.icij.org/investigations/paradise-papers/paradise-papers-research-raises-questions-glencores-440m-congo-discount/" } (last accessed February 2018).

[49] The Guardian. 2017. *Paradise Papers prompt criminal complaint against Glencore*. (21 December). Available at: { HYPERLINK "https://www.theguardian.com/business/2017/dec/21/paradise-papers-prompt-criminal-complaint-against-glencore" } (last accessed February 2018).

[50] The Guardian. 2017. *Paradise Papers: US puts sanctions on billionaire over dealings in DRC*. (22 December). Available at: { HYPERLINK "https://www.theguardian.com/news/2017/dec/22/paradise-papers-us-sanctions-billionaire-dealings-drc" } (last accessed February 2018).

[51]Financial Times. 2018. *Ivanhoe founder Robert Friedland joins debate over DRC mining code* (7 February). Available at: { HYPERLINK "https://www.ft.com/content/44800d7c-0be4-11e8-839d-41ca06376bf2" } (last accessed February 2018).

[52] Tsani. 2013.

[53] US Department of State. 2015. 2015 *Investment Climate Statement - Democratic Republic of the Congo*. Available at: { HYPERLINK "https://www.state.gov/e/eb/rls/othr/ics/2015/241522.htm" } (last accessed February 2018).

funds) in the past[54] but it has not been overly active in promoting them (but this is an area for research on its own). However, the reality is perhaps that a SWF would provide too much legitimacy and result in higher tax revenues. Indeed, the German Society for International Cooperation (GIZ), calculated that between 2011 and 2014, tax revenue from the mining sector was equivalent to just 6%[55] and this is far from the 46% recommended by the World Bank.[56]

There maybe concern in the DRC that energy tax increases would result in the withdrawal of some MNCs but that should not be a consideration in deciding to establish an SWF. While further research is needed on the impacts of foreign companies due to the creation or ongoing operation of SWFs, it is noticeable that several large MNCs have even reduced or pulled out of their operations in Norway recently however, though they have been replaced by other smaller energy companies.[57] There is clearly an abundance of resources and lower operational costs in Congo, and the tax rates are very low (compare with the Norwegian rate earlier in this section) so the business opportunity will remain for MNCs. The energy sector needs reform in DRC and its population need to benefit as currently there is little visible benefit and especially in light of multiple reports that state the mining labour force consists of circa 40,000 children.[58]

There are clearly many issues in DRC's energy sector but it is interesting to note the conflict that is provided by the following three issues: with allegations of corruption by both the MNCs and the DRC government (as highlighted earlier); the noted high returns available for companies by the International Trade Administration (ITA) of the U.S. Department of Commerce from their mining sector[59]; and all these issues in a country where just 9% of its circa 79 million population have access to electricity.[60] The establishment of a SWF would address some of these concerns and ensure redistribution occurs from the countries wealth in energy and natural resources.

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[54] Calder, J. 2014. Administering Fiscal Regimes for Extractive Industries: A Handbook. Washington DC, US: IMF.

[55] Radley, B. 2016. *The limits of corporate social responsibility and the possibilities for harnessing mining to reinstitute processes of state-led local development in the DRC*. In F Reyntjens, S Vandeginste & M Verpoorten (Eds.), *L'Afrique des Grands Lacs Annuaire*, 2015-2016 (pp. 169-186). Paris: L'Harmattan.

[56] World Bank. 2008. *Democratic Republic of Congo Growth with Governance In the Mining Sector*. Available at: { HYPERLINK "http://siteresources.worldbank.org/INTOGMC/Resources/336099-1156955107170/drcgrowthgovernanceenglish.pdf" } (last accessed February 2018).

[57] The Norwegian Government Pension Fund Global. 2018.

[58] Multiple reports available on this: Amnesty International. 2018. *Is my Smartphone powered by Child Labour?* Available at: { HYPERLINK "https://www.amnesty.org/en/latest/campaigns/2016/06/drc-cobalt-child-labour/" } (last accessed January 2018).

[59] International Trade Administration (ITA) - U.S. Department of Commerce. 2018. *Congo (DR) - Mining and Minerals.* Available at: { HYPERLINK "https://www.export.gov/article?id=Congo-Democratic-Republic-Mining-and-Minerals" } (last accessed February 2018).

[60] International Trade Administration (ITA) - U.S. Department of Commerce. 2018. *Congo (DR) - Energy*. Available at: { HYPERLINK "https://www.export.gov/article?id=Congo-Democratic-Republic-Energy" } (last accessed February 2018).

5. Conclusions, and Law & Policy Implications

Given the rampant existence of inequality in the world there is a need to ensure fairer outcomes from the policy-making process. This paper focuses on the energy sector and specifically energy taxation policy, and calls for more distributive justice which is a theoretical concept increasing in importance in the literature, in taxation and energy research literature. One method of achieving that is for resource rich nations to develop SWFs to deliver distributive justice in their energy taxation policy. A SWF can result in redistribution of resources across society as well as orienting the economy towards a long-term and sustainable future. This paper demonstrates the need for resource rich developing countries in particular to move away from the short-term benefits that multi-national companies encourage when they extract energy resources in their countries.

Distributive justice is emerging as demonstrated in section two as a key theoretical concept in economic, energy and taxation literature. In this paper it is linked to the establishment and operation of SWFs and their potential for reducing inequality in society through its redistributive effect on tax revenue generated from the energy sector. In developing new energy law, specifically energy taxation law, a set of guiding principles has recently been published. Such guiding principles can be a force of change, for example, one can witness worldwide the example of one of the most established environmental law principles, i.e. the polluter pays principle. In this context, these principles of energy law can "*act as a guide to policymakers, academics, lawyers, judges and arbitrators when adjudicating, enforcing, making or formulating documentation, laws, regulations, judgments, etc on energy law*".[61] Energy law is stated as having seven guiding principles and these are stated below in Table 1 and these can assist in guiding the development of an SWF that ensures distributive justice moves from a theoretical concept into practice.

Table 1: Principles of Energy Law[62]

Principles of Energy Law
1. **The Principle of Natural Resource Sovereignty** 2. **The Principle of Access to Modern Energy Services** 3. **The Principle of Energy Justice** 4. **The Principle of Prudent, Rational and Sustainable Use of Natural Resources** 5. **The Principle of the Protection of the Environment, Human Health & Combatting Climate Change** 6. **Energy Security and Reliability Principle** 7. **Principle of Resilience**

These principles of energy law should act as a guide. They point in particular to many key issues but highlight that energy decision-making needs to have a *long-term perspective* and should be *integrated*. Energy taxation policy should not be developed in isolation (as demonstrated in section three) and the establishment of SWFs are one

[61] P.48. Heffron, R. J., Ronne, A., Bradbrook, A., Tomain, J. P. and Talus, K. 2018. *A Treatise for Energy Law*. Journal of World Energy Law & Business, 11 (1), 34-48.
[62] P. 40. Heffron, *et al.* 2018.

solution that can ensure a long-term and integrated energy taxation policy that has as a key objective distributive justice.

Overall, policy-makers will benefit from demonstrating a long-term policy that incorporates a SWF where it would be open and transparent, even despite far higher tax rates. It would ensure that investors see a long-term vision in for example the DRC (this case study is outlined in detail in section four) that is enabled by supporting legislation that this provides legal certainty as to the Government's aims. Achieving this, while difficult has the benefit of providing a platform for securing investor confidence as they then can invest due to the reduction in risk around new energy infrastructure projects. Indeed, new energy law that is based on the guiding principles above will provide this clarity and certainty for investors and also the public, two of the key stakeholders in the energy sector in the DRC where the latter is often forgotten.

While exploring in detail these energy law principles and SWFs is for future research. It is worth noting that SWFs also have their own set of principles of operation (though which are voluntary), the Santiago principles[63] which are also in need of future scholarly research. However, the formulation and application of revised and/or new energy law on energy taxation can result in a positive societal experience and one that has far more benefits and is more distributively '*just*' than any retention of the current *status quo*.

[63] International Forum of Sovereign Wealth Funds. 2018. *Santiago Principles*. Available at: { HYPERLINK "http://www.ifswf.org/santiago-principles-landing/santiago-principles" } (last accessed February 2018).